

**Letter of Findings: 04-20170292
Gross Retail Tax
For the Year 2014 and 2015**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana Sign Company provided sufficient information to establish that it used its crane truck, related parts, and diesel fuel for transportation to qualify as exempt from use tax under the public transportation exemption.

ISSUES

I. Gross Retail Tax - Public Transportation Exemption.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2-5-4-1; IC §§ 6-2.5-5 et seq.; IC § 6-8.1-5-1; IC § 6-2.5-5-27; *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-3-9](#); [45 IAC 2.2-5-61](#); Sales Tax Information Bulletin 12 (December 2014); Sales Tax Information Bulletin 12 (July 2015).

Taxpayer argues it was not subject to use tax on crane truck, crane truck parts, and diesel fuel used to transport the signs.

II. Tax Administration - Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of manufacturing, delivering, and installing signs. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records and tax returns for 2014 and 2015. The audit determined that Taxpayer had not paid sales tax when it bought various capital assets. Therefore the audit concluded that Taxpayer owed use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results. Additional facts will be supplied as necessary.

I. Gross Retail Tax - Public Transportation Exemption.

DISCUSSION

Taxpayer is in the business of manufacturing and installing large commercial signs. Taxpayer purchased a large crane truck, truck parts for the truck, and diesel fuel ("Protested Items"). The Department's audit assessed tax on these transactions. Taxpayer argues that the Protested Items were used in public transportation and therefore exempt from sales tax. The issue is whether Taxpayer was entitled to claim the public transportation exemption.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

During the audit, Taxpayer argued that the Protested Items are exempt from use tax under public transportation exemption. The audit report stated, "The Department does not agree with the taxpayer's claim they are engaged in public transportation. According to taxpayer's website, they are a sign manufacturing service and installation company. Their business purpose is to sell signs, banners, vehicle wraps and branding items and perform sign installations. No place on their website does it advertise that they are engaged in hauling for hire nor is there any signage at the business advertising it offers hauling for hire." The report went on to note that, "A check of the taxpayer on the Federal Motor Carrier Safety Administration website showed the taxpayer's operation classification to be *Private*. According to the site, the definition of a private classification is, 'A motor carrier whose highway transportation activities are incidental to and in furtherance of its primary business activity.'"

Taxpayer relies on the exemption set out at IC § 6-2.5-5-27 as follows:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

[45 IAC 2.2-5-61](#), in relevant part, provides:

(a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.

(b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

(c) In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property.

The Department's Sales Tax Information Bulletin 12 (July 1, 2015) (20150729 Ind. Reg. 045150221NRA) sets out certain benchmarks necessary for a transportation business to qualify for the exemption. See *also* Sales Tax Information Bulletin 12 (December 1, 2014) (20150128 Ind. Reg. 045150028NRA).

The Bulletin provides:

The following requirements are factors the department weighs in determining whether a transportation company is engaged in public transportation. An asterisk (*) indicates a requirement that is considered by the department to be a critical factor in determining whether a transportation company qualifies for the public transportation exemption. A transportation company fails to qualify for the exemption if it does not, at a minimum, adhere to all the critical requirements. However, failure to adhere to one or more of the "noncritical" requirements can also result in a transportation company's failure to qualify for the exemption. The requirements are

- The transportation company must transport the persons or property of another.*
 - The transportation company must maintain all shipping/transporting documents for all transactions (e.g., trip reports, truck logs, and invoices).*
- The transportation company must receive compensation for the services it provides.*
- The transportation company must hold and pay for appropriate public transportation insurance.*
- The transportation company must be fully and independently authorized by federal and/or state authorities to provide public transportation services.*
- If an employee of the parent company performs duties for the parent company and also performs "leased" duties for the transportation company, the parent company must maintain detailed records of when and which duties that employee is performing for the parent company and when and which duties that employee is

performing under the lease.*

- If the parent company makes a capital contribution of the vehicles to the transportation company, titles to the vehicles must be transferred to the transportation company.*
- The transportation company and the parent company must maintain separate books and records, including separate charts of accounts for each company:
 - Transactions between the parent company and the transportation company must evidence a commercially reasonable, arms-length relationship between the parties.
 - Transactions between the parent company and the transportation company must be evidenced by actual invoicing and payments for all transactions.*
 - The parent company and the transportation company must segregate and account for each entity's purchases and expenses.*
 - The parent company and the transportation company must maintain separate bank accounts.
 - The parent company and the transportation company must issue separate W-2 forms to their employees.
 - The parent company and the transportation company must maintain separate federal depreciation schedules pursuant to generally accepted accounting standards.
 - Any income earned by the transportation company for transporting for a third party is to be recognized by the transportation company.
 - Because the transportation company and the parent company must have a distinct, arms-length business relationship, their separate incomes and expenses must be reflected on the taxpayers' federal income tax filings, all of which must be reconciled with the taxpayers' own records. When transactions are eliminated as intercompany transactions, the taxpayers must file the appropriate schedules with their federal returns.*
- If the parent company owns and holds titles to the vehicles, the parent company may lease those vehicles to the transportation company. However:
 - The lease must be documented as a commercially reasonable, arms-length transaction; and
 - The lease must be evidenced by actual payments to the parent company.
- If the transportation company owns the vehicles, titles to the vehicles must be held by the transportation company.
- The parent company and transportation company must have separate employees, or, if the transportation company leases its employees from the parent company, there must be a meaningful, arms-length charge for the leased employees.

In this instance, Taxpayer provided purchase orders, invoices, proof of transportation insurance, a contract with customer, packing slip, and the purchase order for the crane truck. The terms of the contract between customer and Taxpayer shows that Taxpayer is responsible for delivering and installing signs and that Taxpayer is "accountable for services rendered." Taxpayer also provided a letter from customer which states that the customer manufactures signs and outsources its installation to Taxpayer. While Taxpayer is listed as *Private* on the Federal Motor Carrier Safety Administration, the definition includes the use of the motor carrier in furtherance of its primary business activity. Taxpayer's business includes building signs, but also delivering and installing signs. Taxpayer's documentation shows that it meets the qualifications spelled out in Sales Tax Information Bulletin 12, such as The transportation company must transport the persons or property of another; the transportation company must maintain all shipping/transporting documents for all transactions; the transportation company must receive compensation for the services it provides; the transportation company must hold and pay for appropriate public transportation insurance. Thus, the protested items are used in the course of public transportation.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration - Negligence Penalty.

Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier,

or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2](#)(c). The taxpayer "must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section." *Id.* The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case." *Id.*

In this instance, Taxpayer has demonstrated that its actions were reasonable as described in [45 IAC 15-11-2](#)(c). Thus, Taxpayer's request for penalty abatement is sustained.

FINDING

Taxpayer's protest of the negligence penalty is sustained.

SUMMARY

Taxpayer's protest regarding gross retail tax is sustained. Taxpayer's protest of negligence penalty is sustained.

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